No. 09-1459

IN THE

SUPREME COURT OF THE UNITED STATES

The State of South Carolina,

Petitioner,

v

Kenneth Navy,

Respondent

On Petition for a Writ of Certiorari
To the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Kenneth Navy respectfully requests that this Court deny the petition for a writ of certiorari.

JURISDICTION

The State asserts that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). That is incorrect; that statute deals solely with cases from federal courts of appeals. This Court may have jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Factual Background

23 month-old Kenny Navy died on Sunday, February 9, 2003. R. 1269, ll. 12 – 1270, l. 16. That night, the police took a statement from the boy's father, Respondent Kenneth Navy, at Richland Memorial Hospital. Respondent said the child had suddenly just stopped breathing. Kenny Navy was born four months prematurely and had major health problems that required him to be on oxygen after he left the intensive care unit and went home. Although there was evidence the child had improved, evidence showed he was congested and "wheezing" a short time before he ultimately stopped breathing.

A pathologist performed an autopsy on the child. The pathologist concluded, and told the police, that the child had been suffocated.

Two days later, on the day on which Kenny Navy's funeral visitation was scheduled, Investigator James Smith and Sergeant Lancy Weeks went to Respondent's house. It was 9:00 a.m., and Respondent was upset and crying. Officer Smith explained they were going to "get him into the office to interview him further and take another statement from him." R. 1270, ll. 22 – 1271, ll. 4. Respondent asked whether the interview could wait until after

the visitation, but the officers said no. Pet. App. A30. Accordingly, Respondent accompanied the officers to the police station. The officers transported him in the back seat of an unmarked police car.

The police "began the questioning of Respondent" at 9:50 a.m. "with the intention of eliciting a confession." Pet. App. A17. Nonetheless they did not read Respondent his *Miranda* warnings before they began to interrogate him. Under interrogation, Respondent told Smith he was caring for his two children that Sunday afternoon when he heard "Kenny crying like he had a nightmare." Respondent comforted him and went downstairs and got him a bottle. When he returned upstairs, he saw the child was having problems breathing. Respondent panicked and ran downstairs to get his friend Terry to help. When Respondent returned upstairs the child "was lifeless." Respondent brought the child downstairs and began performing CPR. He then picked up the phone and called 911. R. 1277, ll. 2–1280, l. 11. Respondent also told Smith that he explained to the EMS personnel that his son was born prematurely and had "a hole in his heart and lungs." R. 1280, ll. 12–20. Respondent's first statement was given at 9:50 a.m. Pt.App.A.7.

At the conclusion of Respondent's "first statement," Officer Smith informed Respondent that his son had actually been suffocated. "As a result of that, he expressed some shock." R. 1281, ll. 23–1282, l. 8. The police also told Respondent there was evidence his son had broken ribs. R. 1304, ll. 1–6.

The police then continued to question Respondent in an "unwarned custodial interrogation designed to elicit incriminating information." Pet. App. A17. Respondent told Officer Smith he "sort of popped the baby in the back when he was on his stomach and he had patted the baby on its mouth to stop him from crying." R. 1305, ll. 11–1306, l. 15.

At that point, the police took a break from the interrogation so that Respondent could smoke a cigarette in the back parking lot. Officer Smith accompanied him while doing so. Pet. App. A39; R. 1329, ll. 5-22. Indeed, Officer Smith never left Respondent alone to wander anywhere in the Sheriff's Department at any time that day. Pet. App. A39.

After Respondent finished his cigarette, Smith escorted him back inside. The police then gave Respondent his *Miranda* warnings for the first time, and at 11:35 a.m. began to intensely question him about popping the child on the back and patting the child's mouth. R. 1307, ll. 7–24; R. 1420.[1]

Respondent then said he put his hand over the child's mouth only because he could not get the child to be quiet and stop crying. Respondent added, "I knew I knocked out his breath and I figured he would catch it by the time I got back up to the room. I heard him making that noise. It was like he was still trying to catch his breath. That was when I panicked. He quit breathing . . ." R. 1290, l. 5 – 1291, l. 7. The police asked Respondent if it was possible that his hand covered both the child's nose and mouth. Respondent admitted that it was possible. Respondent also said he had never popped the child on the back like that before. R. 1291, l. 8 – 1292, l. 5.

After the police took this statement, they consulted with the pathologist by telephone. The pathologist informed them Respondent would have had to have held his hand over the child's mouth and nose for a longer period of time than a few seconds. At the same time, the pathologist proceeded to the funeral home to perform a further inspection on

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[1] Respondent testified at the pretrial suppression hearing that the police did not give him *Miranda* warnings even as early as they now claimed. Respondent said "he didn't give me that [*Miranda*] until the third one [statement]." R. 1334, ll. 6 –1336, l. 6.

the back of the child. More bruising was then discovered at the funeral home. R. 1292, ll. 21 – 1294, l. 7.

The police then questioned Respondent about whether he could have held his hand over the child's mouth and nose for a longer period. Respondent admitted in his "third statement" that it could have been longer. Respondent said it could have been a minute but not more than two minutes, and that the child was gasping for air when he removed his hand. R. 1295, ll. 6 – 24.

At this point, after three hours of total questioning, the police officially arrested Respondent.

B. Procedural History

1. The State charged Respondent with homicide by abuse. Prior to trial, Respondent filed a motion to suppress all three of his statements to the police. Respondent argued that each was the product of custodial interrogation in violation the dictates of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny – the first statement because he had not yet been *Mirandized* and the second and third because the *Miranda* warnings were ineffective insofar as he had already made incriminating statements before receiving the warnings. Respondent noted that had been under a physical disability because he had been awake for three days, he was exhausted, distraught, and crying constantly. Respondent had also been interrogated for three hours. R. 1353, ll. 7 – 1355, l. 9.

The trial court denied Respondent's motion. It held Respondent's first statement was voluntarily given and that his second and third statements were given following effective *Miranda* warnings. Tr. 1361, l. 3 – 1364, l. 22.

The State introduced all three of Respondent's statements at trial. Respondent took the stand and denied ever abusing his child or intending to harm him on the day he died. He testified that his first statement was the only correct statement and that he had signed the other two without reading them so that he could go home. Pet. App. A39. He was convicted as charged and sentenced to twenty years in prison.

2. In between Respondent's trial and his appeal to the South Carolina Court of Appeals, this Court held in *Missouri v. Seibert*, 542 U.S. 600 (2004), that when the police utilize a "question-first" technique -- interrogating the suspect before giving *Miranda* warnings, and then getting the suspect to repeat incriminating statements after such warnings -- the subsequent statements must be suppressed because the *Miranda* warnings are ineffective. Respondent thus argued on appeal that his first statement should have been suppressed as a straightforward violation of *Miranda* and that his second and third statements should have been suppressed under *Seibert*. The South Carolina Court of Appeals unanimously agreed, holding that all three of Respondent's statements should have been suppressed. Pet. App. 28a-51a. The court of appeals remanded the case for a new trial. Pet. App. A51.

3. The South Carolina Supreme Court affirmed in part and reversed in part. It agreed with the court of appeals that Respondent's second and third statements were taken in violation of *Seibert* because the police first conducted an unwarned interrogation in which they got Respondent to say that he "popped" the child on the back and patted his mouth, and only then issued *Miranda* warnings to get him to repeat and elaborate on that admission. Pet. App. 15a-19a. The court, however, held that the first statement was admissible because

Respondent had not been in custody until the police told him that they believed that the child had been suffocated.[2]

REASONS FOR DENYING THE WRIT

The State first asks this Court to apply its decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), to the facts of this case and to hold that Justice Kennedy's concurrence in that case controls concerning whether *Miranda* warnings given during a question-first interrogation are sufficient to render post-warning statements admissible. This Court has denied two recent petitions asking this Court to extrapolate a controlling rule from *Seibert* – *Texas v. Martinez*, 130 S. Ct. 53 (2009); *Ohio v. Farris*, 549 U.S. 1252 (2007) – and there is no reason for a different outcome here. As in those cases, the court below correctly applied *Seibert* to a "question first" interrogation and trial record created before that case was decided. As at the time of those cases, there is no meaningful conflict in authority regarding how to apply *Seibert*, the vast majority of courts applying the decision have applied factors and analysis from *both* the plurality opinion and Justice Kennedy's concurrence. No court has decided a case in which strict application of either opinion was outcome determinative. And even if there were meaningful confusion over *Seibert* in the lower courts, this case would be a poor vehicle for resolving it. No judge that has reviewed this case has found that its outcome hinges on whether one of the two *Seibert* opinions exclusively governs "question first" interrogations.

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[2] The three Justices in the majority of the South Carolina Supreme Court were all former long time trial judges. Justice Costa Pleicones had been a resident judge in Richland County where this case arose from, and thus likely was personally familiar with the police department at issue. Sitting Associate Justice James Kenzer Barber, III, who also voted with the majority, was a resident judge in Richland County at the time this appeal was heard in the State Supreme Court.

The State also asks this Court to review the South Carolina Supreme Court's determination that Respondent was "in custody" for purposes of *Miranda* when he gave the statements at issue. That is an entirely fact-bound issue that the court below decided correctly. Further review is not warranted.

I. The South Carolina Supreme Court's Application of *Seibert* to the Facts of This Case Does Not Warrant Review.

1. The Supreme Court of South Carolina correctly held that this Court's decisions in *Seibert* and *Oregon v. Elstad*, 470 U.S. 298 (1985), require the suppression of Respondent's second and third statements to the police. In *Elstad*, the defendant made a cursory, one-sentence inculpatory statement in his own living room, before his arrest. 470 U.S. at 300-01. The officer's failure to provide *Miranda* warnings was an "oversight" apparently due to "confusion" as to whether the defendant was actually in custody at the time. *Id.* at 315-16. Officers transported the defendant to the police station where, an hour later, a different officer read him his *Miranda* warnings. *Id.* at 301. The defendant made a full confession that went far beyond the initial statement he provided in his living room. *See id.* at 301-02. This Court held that the defendant's post-warning confession should not be suppressed solely because he had made an unwarned inculpatory statement. *Id.* at 318.

The interrogation in Seibert represented the "opposite extreme." 542 U.S. at 616 (plurality opinion). The defendant in *Seibert* confessed during an initial interrogation conducted at the police station, before any *Miranda* warnings. *Id.* at 604-05 (plurality opinion). After a short break, the same police officer gave defendant her *Miranda* warnings, and continued the interrogation, in the same location, eliciting a confession that was "'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 605-06 (plurality opinion). In contrast to *Elstad*, the omission of *Miranda* warnings was not an

"oversight," and there was no doubt that defendant was in custody. *See id.* at 616 (plurality opinion). The Court thus held – though a plurality opinion and a concurrence by Justice Kennedy – that defendant's post-*Miranda* confession was inadmissible.

Contrary to the State's various fact-intensive arguments, Pet. 29-38, the South Carolina Supreme Court properly concluded that the *Seibert* plurality opinion required suppression of Respondent's second and third statements. The plurality explained that "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle," especially where nothing is "said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led [Respondent] through a systematic interrogation." 542 U.S. at 614, 616. That is just what happened here. Each relevant round of questioning here occurred at the police station and was conducted by the same officers. "The officers began the questioning of Respondent with the knowledge that he child had been suffocated and with the intention of eliciting a confession." Pet. App. A17. They did not give *Miranda* warnings, deciding instead to commence "an unwarned custodial interrogation designed to elicit incriminating information." Pet. App. A17. Once they obtained incriminating statements, the police allowed Respondent a quick, "supervised cigarette break" and then "immediately" administered *Miranda* warnings and resumed interrogation. Pet. App. A17. Respondent repeated, and elaborated on, the

"same" information he had just given in a way that intertwined the two interrogations. Pet. App. A9.[3]

The State also asserts that Respondent's statements "would have been clearly admissible under Justice Kennedy's test." Pet. 38. This assertion is unfounded. Justice Kennedy wrote in *Seibert* that statements should be suppressed when (1) "the two step interrogation technique was used in a calculated way to undermine the *Miranda* warning" and (2) the police took no measures to cure the situation. 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment). Both of those things occurred here. First, the South Carolina Supreme Court explained that the officers interrogated Respondent "with the intention of eliciting a confession" and that the unwarned custodial interrogation was "designed to elicit incriminating information" outside of *Miranda*.[4] Pet. App. A17. Second, "none of the curative measures suggested by Justice Kennedy, i.e., an additional warning that the answers given . . . before the administration of *Miranda* warnings may not be admissible, a substantial break in time, or change in circumstances, occurred here." Pet. App. A17 (footnote omitted). In these circumstances, "a reasonable person in [Respondent's] situation" undoubtedly would not "understand the import and effect of

[3] For example, respondent's pre-*Miranda* admission to popping the child on the back rather than simply patting him was an admission to improperly hitting the child and his subsequent post-*Miranda* explanation that he popped the child on the back because "I was frustrated because he was crying" was inextricably entwined with his pre-*Miranda* admission of wrongdoing. It was simply an attempt to explain his pre-*Miranda* admissions.

[4] Acting Associate Justice James Rezner Barber, III, who voted with the majority of the South Carolina Supreme Court, is a Circuit Court Judge residing in Richland County, South Carolina, where this case arose, and it is more than fair to conclude he consequently was confronted with the contentions of Investigators Smith and Weeks on prior occasions. Judge Barber was in the highly unusual position of being able to determine, from longtime personal experience, whether the actions of Investigators Smith and Weeks in utilizing the question first method were deliberate for purposes of Justice Kennedy's test. Justice Pleicones was similarly well situated as a former Richland County Circuit Court Judge.

the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

Moreover, even if the police's failure to provide warnings here had not been deliberate, this Court's decision in *Elstad* would still dictate that the statements should have been suppressed. In *Elstad*, which not only Justice Kennedy's *Seibert* concurrence but also the dissent endorsed, this Court recognized that a midstream *Miranda* warning may be "improper" – and thus insufficient to avoid suppression of post-warning statements –if the officer "exploit[s] the unwarned admission to pressure Respondent into waiving his right to remain silent." *See Elstad*, 470 U.S. at 316-18; *see also Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment) (reaffirming this principle); *id.* at 628-29 (O'Connor, J., dissenting) (same); *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (evidence that suspect was "tricked" into waiving his rights "will, of course, show that the defendant did not voluntarily waive his privilege."). Here, the officers did just that. "[R]ight after" the Respondent said that he "popped" the child on the back, the police provided *Miranda* warnings, and then asked Respondent to explain why he did that. R. 1304, ll. 18 – 1305, l. 8. Respondent responded that held his hand over the child's mouth out of frustration because the child was crying. Pet. App. A38. As Justice Kennedy observed in *Seibert*, "[r]eference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating." 542 U.S. at 621. Indeed, in a case similar to this one, the Alaska Court of Appeals held that the police officer's interrogation was improper under both the plurality's test in *Seibert* and the exploitation prong of *Elstad* reaffirmed by the other members of the *Seibert* Court. *See Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004). ("[E]xploitation" exception of *Elstad* met where officer elicited

confession, immediately administered *Miranda* warning, "and then, essentially without pause, . . . reminded [the defendant] of his confession and asked him to re affirm it.").

2. The State asserts that courts are "split over whether Justice Kennedy's test represents the *Seibert* holding." Pet. 5. But, in reality, no significant disagreement exists regarding *Seibert*.

Court after court has determined, just like the South Carolina Supreme Court implicitly decided in this case, that question first cases after *Seibert* come out the same way regardless of whether one applies *Seibert*'s plurality's opinion, Justice Kennedy's opinion, or an amalgam of the two.[5] While Justice Kennedy in *Seibert* placed more

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[5] *See, e.g.*, *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) ("[Defendant's] statements would be admissible under any test one might extract [from *Seibert*]."); *United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) ("We do not need to resolve this issue because regardless of the applicable framework [defendant's] statement must be suppressed."); *United States v. McConer*, 530 F.3d 484, 498 (6th Cir. 2008) (holding that defendant's statements were admissible under both the plurality test and Justice Kennedy's test); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("This case does not require us to determine which opinion reflects the holding of *Seibert*" because defendant's statements "would be admissible under the tests proposed by the plurality and by the concurring opinion."); *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1137-39 (11th Cir. 2006) (holding that defendant's statements were admissible under both the plurality and Justice Kennedy's test); *United States v. Terry*, 400 F.3d 575, 582 (8th Cir. 2005) (same); *United States v. Felters*, 397 F.3d 1090, 1098 (8th Cir. 2005) (same); *United States v. Briones*, 390 F.3d 610, 613-14 (8th Cir. 2004) (same); *United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (holding that post-warning statements were inadmissible under both the plurality opinion's approach and Justice Kennedy's test); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (noting that when two-step interrogation is deliberate, "the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge"); *Edwards v. United States*, 923 A.2d 840, 853 (D.C. 2007) (holding that defendant's statements were inadmissible, and concluding that "[t]he result is the same under the plurality's test as under Justice Kennedy's test."); *Alkahala-Sanchez v. Commonwealth*, 255 S.W.3d 916, 922 (Ky. 2008) (applying both the *Seibert* plurality and Justice Kennedy's concurring opinion, and holding that defendant's statements were admissible); *People v. Paulman*, 833 N.E.2d 239, 247 (N.Y. 2005) ("Because the statements in this case are admissible under the plurality's more stringent test, they are necessarily admissible under Justice Kennedy's analysis."); *State v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009) ("In this case, we again

emphasis on the police officers' intent to evade *Miranda*, both his opinion and the plurality's require officers who fail to give *Miranda* warnings at the outset of interrogations to give "curative measures," and those curative measures are nearly identical to the objective factors given by the plurality opinion as part of its threshold "effectiveness" inquiry. *Compare Seibert*, 542 U.S. at 615-16 (plurality opinion), *with id.* at 622 (Kennedy, J., concurring in the judgment). It thus is no surprise that the State does not point to any decision in which a court has found that choosing between the plurality or Justice Kennedy's opinion was outcome determinative.

Nor does the State point to any court applying Justice Kennedy's opinion in a way that shows it would have decided this case differently. Rather, the State simply claims that four federal courts of appeals and one state supreme court have "promoted Justice Kennedy's test and held absent evidence of deliberate police action, the court should proceed only under *Elstad*." Pet. 9, 13 (citing *United States v. Kuan*, 432 F.3d 524 (3d Cir.), *cert. denied*, 126 S.Ct. 1453 (2006); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005); *United States v. Courtney*, 463 F.3d 333 (5th Cir. 2006); *United States v. Black Bear*, 422 F.3d 658 (8th Cir. 2005); *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006)). But as explained above, the South Carolina Supreme Court found, as Justice Kennedy's test requires, that the officers here interrogated Respondent "with the intention of eliciting a confession" and that the unwarned custodial interrogation was "designed to elicit incriminating information" outside of *Miranda*. Pet. App. A17; *see supra* at 9-10.

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determine that it is unnecessary to predict the eventual outcome of the competing *Seibert* approaches because we find that the Defendant's post-warning confession is inadmissible under either the plurality's or Justice Kennedy's test.")

And *Elstad* itself requires suppression here as well. *See supra* at 10. Thus, all of those courts would have required suppression of Respondent's second and third statements too.

Furthermore, the five cases that the State says follow Justice Kennedy's test exclusively are distinguishable in other ways. In *Kiam*, the defendant was not even entitled to *Miranda* warnings at all because the questioning occurred at an international border. *Kiam*, 432 F.3d at 528. In *Mashburn*, the failure to initially provide a *Miranda* warning was plainly an oversight, *see* 406 F.3d at 305, 309 n. 5, and took place in circumstances quite similar to the facts of *Elstad*. *Mashburn*, 406 F.3d at 305. In *Courtney*, the Court held that *Seibert* did not apply because the defendant was not in custody and, in any event, a substantial passage of time passed between the statements. 463 F.3d at 338. Neither of those is the case here. In *Black Bear*, the Eighth Circuit found that *Seibert* was inapplicable because "*Miranda* warnings were given at the *beginning* of a continuous interrogation in the same room by the same officer who witnessed the warning at the outset." *Black Bear*, 422 F.3d at 664 (emphasis added). Again, that is different than this case, where the police gave *Miranda* warnings only after interrogating Respondent for some time. Finally, in *Jackson*, the Kentucky Supreme Court did not even assess whether *Seibert* was violated, deciding instead to remand the case for an evidentiary hearing. 187 S.W.3d at 305. Thus, it is impossible to know whether that court might have decided this case any differently than the South Carolina Supreme Court.

3. Even if there were meaningful disagreement among state and federal courts regarding how to apply *Seibert*, this case, for two reasons, would present a poor vehicle for addressing it.

First, as explained above, nothing in this case turns on whether Justice Kennedy's concurrence in *Seibert* constitutes the controlling opinion in that case. The South Carolina applied both Justice Kennedy's opinion and the plurality opinion and concluded that both required suppression. *See* supra at 9-10.

Second, this case lacks an appropriate evidentiary record for giving any meaningful guidance regarding how to apply *Seibert*. This Court has repeatedly recognized that the development of constitutional principles is best undertaken in the context of concrete cases with fully developed records. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam). The suppression hearing and trial in this case were held *before* this Court's *Seibert* decision. The South Carolina Supreme Court thus noted that "it is not surprising that defense counsel did not specifically question Investigator Smith whether he was using [a deliberate "question first"] strategy." Pet. App. A18. Still, it was apparent enough from the record that the police's unwarned custodial interrogation of Respondent was "designed to elicit incriminating information." Pet. App. A17.[6] If this Court does decide someday to elaborate on *Seibert*, it should do so in a case in which officers conducted their interrogation in the post-*Seibert* world, and in which the trial court applied factors from the *Seibert* decision to a full factual record.

Awaiting further consideration and application of *Seibert* in the lower federal courts makes particularly good sense because it may become apparent with experience that the

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[6] The government has the burden to establish that it obtained a valid waiver of the right against self-incrimination — including demonstrating the effectiveness of *Miranda* warnings. *Colorado v. Connelly*, 479 U.S. at 157, 167-68 (1986); *Miranda*, 384 U.S. at 475, 478-79. Thus, any deficiencies in the record would have to be construed against the State in any event. The State clearly failed to show that its officers did *not* engage in a deliberate "question first" strategy.

question presented is of little general importance. Cases involving pre-*Seibert* interrogations such as this one are clearing out of the courts, and police departments on the ground have begun adjusting to *Seibert*. As they continue to do so, there is every reason to believe the two-step interrogations triggering litigation will prove rare.

II The South Carolina Supreme Court's Determination That Respondent Was "in Custody" Does Not Warrant Review.

The State's contention that the South Carolina Supreme Court erred in determining that Respondent was in custody during his second and third statements is likewise weak and it does not deserve this Court's attention. The South Carolina Supreme Court applied *State v. Evans*, 582 S.E.2d 407 (S.C. 2003), a state case entirely consistent with federal jurisprudence on when a person is considered in custody. As the South Carolina Supreme Court explained: "[w]hether a suspect is in custody is determined by an examination of the totality of the circumstances, such as location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning." Pet. App. A14.

The State, in fact, does not dispute that this quote correctly describes this Court's precedent. Nor does the State argue that the South Carolina Supreme Court's decision creates any kind of conflict in the lower courts. Instead, the State requests this Court's review on two grounds, neither of which are proper grounds for certiorari.

First, the State asserts that the South Carolina Supreme Court misapplied the settled law it correctly recited in that it focused its analysis "on subjective considerations rather than the objective factors prescribed by this Court." Pet. 22. This is incorrect. The South Carolina Supreme Court expressly recognized that the test for custody "is an objective determination, what is, would a reasonable person have believed he was in custody." Pet. App. A14. And the South Carolina Supreme Court properly considered the change in the

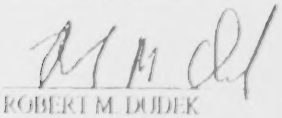
nature of the officers' questioning (specifically, the officers' springing the suffocation charge on Respondent) as relevant to its objective determination that Respondent was in custody. Pet. App. A8. If anything, Respondent was in custody for all three statements, not just the last two. As the South Carolina Court of Appeals explained, the officers transported Respondent to the police station in the back of a squad car, rendering him unable to leave on his own; refused to delay questioning until after Respondent's son's funeral visitation; accompanied him outside each time he took a smoking break; refused to let him to walk about the Sheriff's Department freely; and questioned him for a lengthy period of time. Pet. App. A41-42.

The State also contends that the South Carolina Supreme Court "stretched the facts beyond reasonable interpretation." Pet. 16. Such factual quibbling does not warrant review. In any event, the South Carolina appellate courts correctly recited the facts. The State complains that the police officers testified here that they "did not realize [Respondent] was in custody," and it asserts that Respondent "did not think he was under arrest." Pet. 21, 24. But as the State itself admits, it does not matter whether the officers asserted at the suppression hearing that Respondent "was not in custody" or what Respondent subjectively thought when the questioning began. Pet. 22. The operative test is an objective one. And as just explained, numerous objective factors made clear that Respondent was in custody.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

July 30, 2010

No. 09-1459

IN THE

SUPREME COURT OF THE UNITED STATES

The State of South Carolina

Petitioner,

v.

Kenneth Navy,

Respondent

CERTIFICATE OF SERVICE

I certify that copies of the brief in opposition in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 30th day of July, 2010.

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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018